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Supreme Court of the United States

October Term, 1942.

No. 722

STANDARD DREDGING CORPORATION, Employer,
Appellant,

vs.

FRIEDA S. MILLER, INDUSTRIAL COMMISSIONER, *et al.*

On Appeal from the Supreme Court of the State of New York, Appellate Division, Third Department.

BRIEF FOR APPELLANT.

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Supreme Court of the United States

OCTOBER TERM, 1942

STANDARD DREDGING CORPORATION, Appellant, *vs.* FREDA S. MILLER, AS INDUSTRIAL COMMISSIONER OF THE STATE OF NEW YORK, AND MIKE CASSARETAKIS.	No. 722

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT.

BRIEF FOR APPELLANT.

On the application of Standard Dredging Corporation, an appeal to this Court was allowed by the Honorable Irving Lehman, Chief Judge of the New York Court of Appeals, by order dated January 6, 1942, from a final order of the Court of Appeals of the State of New York dated October 15, 1942, which reversed an order of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, entered on the 10th day of November, 1941, and affirmed a determination of the New York State Unemployment Insurance Appeal Board that the employment by the appellant of Mike Cassaretakis, the claimant herein, was covered by the New York State Unemployment Insurance Law and that the appellant herein was therefore liable for contributions under said law based upon wages paid to said claimant.

Opinions Below.

The opinion of the Court of Appeals is officially reported in 289 N. Y. 119.[1]

The Appellate Division wrote no opinion except a memorandum decision reported in 263 App. Div. 773.[2]

The opinions of the New York State Unemployment Insurance Appeal Board and the Referee appear in the Record herein.[3]

Jurisdiction.

Jurisdiction to review the decision and order of the Court of Appeals here in question is conferred upon this Court by Section 237 (a) of the Judicial Code[4] and the Act of January 31, 1928.[4a] There is here drawn in question the validity of the New York Unemployment Insurance Law[5] on the ground that said statute, as applied to maritime employment, is repugnant to Article III, Section 2 of the Constitution of the United States. The decision of the Court of Appeals was in favor of the validity of said law as so applied. Accordingly, this court has jurisdiction on this appeal.[6]

Statement.

(A) The Decisions Below.

This cause originated by the filing by the claimant, Mike Cassaretakis, with the Division of Placement and

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[1] R. 107.

[2] R. 104-5.

[3] R., pp. 2-3; R. 5-9.

[4] 28 U. S. C. A. 344.

[4a] 45 Stat. 54.

[5] New York Consol. Laws, Chap. 31 (Labor Law, Art. 18).

[6] See: *Hall* v. *DeCuir*, 95 U. S. 485, 500; *Stewart* v. *Sadrakula*, 309 U. S. 94.

Unemployment Insurance, New York State Labor Department, of a request for a hearing to determine whether the claimant's employment by the appellant was covered by the New York Unemployment Insurance Law, thus requiring the appellant to make contributions to the New York Unemployment Insurance fund based upon the wages paid to the claimant.

After a hearing before one of the Referees appointed by the Industrial Commissioner, the Referee rendered a decision holding, contrary to the contentions of the appellant, that the claimant was not a member of the crew of a vessel operating on the navigable waters of the United States; that there was no constitutional prohibition against the coverage by the New York Unemployment Insurance Law of maritime employment; that said law did cover such employment; and that the appellant was liable for the payment of contributions under said law.

Under the statute, the decision of the referee is not deemed limited in its effect to the immediate employee making the claim for benefits, but is deemed a general determination of the question so decided with respect to *all* those employed by the employer for all purposes of the statute, subject, however to a right of appeal.[6a]

The appellant appealed from the Referee's decision to the New York Unemployment Insurance Appeal Board, specifying as the grounds for such appeal, among others, that the claimant was employed as a member of the crew of a vessel documented under the laws of the United States and operating at the times in question on the navigable waters of the United States; that the claimant's employment was maritime in nature and therefore subject to the exclusive jurisdiction of the Federal Government; that such employment

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[6a] New York Labor Law, Sec. 530(2), Appendix A.

was not covered by the New York Unemployment Insurance Law; and that, if such employment was intended to be so covered, the law was unconstitutional and void.[7]

Thereafter, the Unemployment Insurance Appeal Board rendered a decision which affirmed in all respects the decision of the Referee and adopted as its own the Referee's findings of fact and conclusions of law.[8]

On appeal by the appellant here, the Appellate Division of the New York Supreme Court, Third Judicial Department, reversed the decision of the Appeal Board.[9]

On appeal by the Industrial Commissioner, the Court of Appeals, by its order dated October 15, 1942, and which is the order here under review, reversed the order of the Appellate Division and affirmed the previous determination of the Appeal Board.

In its opinion, the Court of Appeals held:[10]

> (1) That there is no constitutional objection to the coverage of maritime employment by the New York Unemployment Insurance Law;
>
> (2) That Congress did not exclude maritime employment from coverage by State unemployment insurance by the enactment of Section 1607(c)(4) of the Internal Revenue Code, which specifically excludes from the coverage of the Federal Unemployment Insurance Law, officers and members of the crew of a vessel on the navigable waters of the United States;
>
> (3) That the determination of the Unemployment Insurance Appeal Board that the claimant was not a member of the crew of a vessel involved solely a

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[7] R. 4.
[8] R. 2-3.
[9] R. 105.
[10] R. 107-15.

question of fact which, being supported in the record by substantial evidence, was conclusive on the courts.

On October 22, 1942, an order was made and entered in the Appellate Division of the New York Supreme Court, Third Judicial Department, on the remittitur of the Court of Appeals, reversing the aforesaid order of the said Appellate Division therein made and entered on December 1, 1941.

(B) The Facts.

Claimant's Employment: The claimant was employed aboard the dredge *Miami*, first as a cook's helper and later as a night cook. His employment on the *Miami* commenced on February 4, 1939 and terminated on or about August 17, 1939. During the period February 4, 1939 to and including February 23, 1939, the *Miami*, which was owned by the appellant's parent corporation, was engaged in dredging operations in the navigable waters of the State of New Jersey.[11] Thereafter, the dredge was chartered to the appellant and, on or about March 15, 1939, commenced dredging operations in the navigable waters of Gravesend Bay, New York Harbor, adjacent to the Borough of Brooklyn, City and State of New York.[12]

The claimant's duties consisted of preparing meals, helping to wait on the tables and cleaning up the kitchen, dining room, and the cabins in which the crew slept. He ate three meals a day on board the dredge and, customarily, slept there.[13]

Physical Characteristics of Miami: The dredge *Miami* is a hydraulic suction dredge, documented as a vessel of the United States. She is a steel vessel 153 feet long, 40

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[11] R. 13, 20, 69, 74-77, 82, 84.
[12] R. 27-31, 76.
[13] R. 12-15, 20, 21.

feet beam and 9¼ feet deep, having a net tonnage of 547 tons.[14] While not equipped with a propeller, the dredge is capable of self-propulsion by the use of swinging cables attached to anchors and spuds.[15] The dredge's operations require that she keep moving ahead.[16] Steam and electric power is generated aboard the dredge.[17] She has no lines running ashore for water or electricity.[18] She is a sea-going dredge, which after completing the Gravesend Bay job, made the voyage to Jacksonville, Florida, and after completing a job there, moved on to another job at Tampa, Florida.[19]

Thus the operation of the *Miami* took her within a short time to the States of New Jersey, New York and Florida.

Officers and Crew of Miami: During the dredging operations, the *Miami* carried a crew of from 42 to 50 men working on three shifts.[20] Her certificate of enrollment calls for a minimum crew of 12, exclusive of the master.[21] The crew was under the direct orders of the captain.[22] Claimant testified concerning the captain: "He is boss for everything. * * * If you don't do your work, he fires you. * * * He is in charge of everything."[23] The deck department was looked after by a mate with deck-hands under him.[24] The leverman operated the hydraulic pump and saw to it that the suction was applied in the proper area.[25] The

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[14] Exhibit B, R. 26, 27, 90A, 90B; Exhibit G, R. 53, 100A.
[15] R. 35, 52, 53.
[16] R. 53, 54.
[17] R. 55.
[18] R. 55.
[19] R. 34.
[20] R. 47.
[21] Exhibit B, R. 27, 90A.
[22] R. 48.
[23] R. 17.
[24] R. 48.
[25] R. 58.

engineroom crew consisted of the chief engineer, first, second and third assistant engineers, firemen, oilers and wipers.[26] The commissary department consisted of a cook, a cook's helper and a steward; they did the cooking and also the work of cleaning, etc.[27] Appellant furnished sleeping facilities and meals aboard the dredge for its officers and crew.[29]

Operation of Miami: In operation, the dredge moved forward by swinging alternately on each of its spuds by means of cables attached to anchors, power being supplied by the engine in the dredge.[29] The pump sucked up the sand and other material from the ocean bottom and sent the dredged material through large pipe lines to the place of deposit[30] which might be up to fifteen miles or more away.[31] The pipe lines were suspended over the water by pontoons.[32] The dredged material was deposited partly under water at some distance from the dredged area, and partly in shallow water to make new land.[33] The dredge was assisted by various small boats which helped place her anchors and bring her supplies.[34]

Gravesend Bay Job: While operating on this job, during the course of which claimant was employed, the dredge *Miami* was at all times afloat at Gravesend Bay, which is a navigable water adjacent to Brooklyn, N. Y.[35] She was dredging an irregularly shaped area located outside the

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[26] R. 48.
[27] R. 48.
[28] R. 17, 57.
[29] R. 35, 52, 53.
[30] R. 36, 50.
[31] R. 16.
[32] R. 35.
[33] R. 50.
[34] R. 50, 55, 58.
[35] R. 31, 61.

pierhead line between Norton Point, Coney Island and Dykers Beach Park.[36]

This dredging job was done pursuant to a War Department permit which permitted digging to a maximum depth of 50 feet below mean low water mark over a navigable area; the dredged material was required to be deposited shoreward of a bulkhead constructed by the City of New York.[37] This War Department permit was issued only after public notice, which stated, "The decision as to whether or not a permit will be issued must rest primarily upon the effect of the proposed work on navigation."[38]

The area required to be filled was navigable water ranging in depth from 2.4 feet to 13 feet at the commencement of the dredging operations.[39] While operating, the dredge was approximately 2,000 feet off the nearest shore point.[40]

Shore Gang: Where a land fill is being created, a shore gang made up of unskilled laborers, usually from 50 to 100, work at leveling the fill. The shore gang is separate and distinct from the dredge crew.[41] Members of the shore gang were not permitted aboard the dredge, as the appellant's regulations prohibited it.[42]

Unemployment Insurance Taxes: The appellant paid contributions under the New York Unemployment Insurance Law on wages of the shore gang, but not on wages of the dredge crew.[43]

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[36] R. 30, 31, Exhibits D, E and E-1, R. 92A, 93, 94.
[37] Exhibits D, E and E-1.
[38] Exhibit D.
[39] R. 66, Exhibits E and E-1.
[40] R. 51.
[41] R. 48, 49.
[42] R. 49.
[43] R. 69.

The United States Treasury Department ruled, on January 4, 1937, that the services performed by the officers and members of the crews of the dredge *Miami* and other dredges (owned by appellant's parent) were exempt from the Social Security Act.[44]

A Specification of the Error to be Urged.

Appellant intends to urge each of the errors heretofore set forth and claimed in its assignments of error.

Summary of Argument.

On the record herein, the appellant intends to argue as follows:

(1) That the claimant was a member of a crew of a vessel operating on the navigable waters of the United States as a matter of law.

(2) That the application of the New York State Unemployment Insurance Law to maritime employment, and especially to officers and members of a crew of a documented vessel operating on the navigable waters of the United States, is unconstitutional in that it violates the provisions of Article III, Section 2 of the Constitution of the United States which reposes exclusive maritime jurisdiction in the Federal Government;

(3) That even if the State of New York could legislate with respect to the regulation of maritime employment, in the absence of Federal legislation with respect thereto, Congress has already occupied the field;

(4) Congress has indicated that it intended to exclude maritime employment from coverage by state unemployment insurance laws.

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[44] Exhibit F, R. 32, 98.

(5) The Constitutional rule requiring National uniformity with respect to the laws applicable to maritime employment has a peculiar application to the case of seamen.

ARGUMENT.

Introduction.

The New York Unemployment Insurance Law,[45] is one of a series of state unemployment insurance laws enacted under the impetus of the Federal Social Security Act.

In his message to Congress sponsoring the enactment of the Social Security Act, the President said:[46]

> "With respect to unemployment compensation, I have concluded that the most practical proposal is the levy of a uniform federal payroll tax, ninety per cent (90%) of which should be allowed as an offset to employers contributing under a state unemployment compensation act. *The purpose of this is to afford a requirement of a reasonably uniform character for all states cooperating with the federal government,* and to promote and encourage the passage of unemployment compensation laws in the states. The ten per cent (10%) not then offset should be used to cover the cost of federal and state administration of this broad system. Thus, states will largely administer unemployment compensation, *assisted and guided by the federal government.*"

Thus it appears, as was so clearly pointed out by this Court in *Buckstaff Bath House Co.* v. *McKinley*:

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[45] New York Consolidated Laws, Chap. 31 (Labor Law, Article 18).

[46] Congressional Record, Vol. 79, Part 1, p. 545, at p. 546.

Emphasis throughout this brief supplied, unless otherwise indicated.

> "The [Social Security] Act was designed * * * to operate in a dual fashion--*state laws were to be integrated with the Federal Act;* payments under state laws could be credited against liabilities under the other. That it was designed so as to bring the states into the cooperative venture * * * [and] that there were great practical inducements *for the states to become components of a unitary plan for unemployment relief.*"[47]

THE NATURE OF THE STATE STATUTE.

The New York Unemployment Insurance Law is not merely a tax statute. The Court of Appeals itself conceded that the New York statute is more than a mere tax statute, for in attempting to distinguish the Federal and State laws, the Court said: [48]

> "The Federal statute, of course, is not an unemployment insurance law. It is a mere taxing statute * * *."

The tax aspect of the New York law is only incidental to its much broader purposes which are essentially regulatory in nature. The statute is intended not merely to alleviate the hardship arising from unemployment, but is also aimed at the regularization and elimination of unemployment.

The real nature of the statute is indicated in its "Declaration of Public Policy of State which reads in part as follows:

> "As a guide to the interpretation and application of this article, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, welfare and morals of the people of this state.

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[47] 308 U. S. 358, 363.

[48] R. 114.

> Involuntary unemployment is therefore a subject of general interest and concern *which requires appropriate action by the legislature to prevent its spread and to lighten its burden* which now so often falls with crushing force upon the unemployed worker and his family."[49]

The New York statute further provides in part as follows:

> "3. It shall be one of the purposes of this article to promote the regularization of employment in enterprises, localities, industries, and the state. The commissioner shall take such steps as are within his means for the reduction and prevention of unemployment."[50]

Thus it becomes apparent that the purpose of the statute is two-fold, namely, to alleviate the conditions arising from unemployment and to take appropriate measures to prevent it. The first purpose is accomplished by paying certain prescribed benefits for limited periods of time to unemployed persons who previously worked in employment covered by the law.[51] In order to pay such benefits, contributions are exacted from employers, measured by a percentage of their payrolls.[52]

In order to accomplish the second, and by far the broader purpose of the statute, namely the regularization and, in so far as possible, the prevention of unemployment, the Industrial Commissioner is authorized to employ experts and to carry on any investigation and research which he deems relevant.[53]

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[49] N. Y. Labor Law, Sec. 500.
[50] Ibid., Sec. 518.
[51] Ibid., Secs. 503-509.
[52] Ibid., Secs. 515, 516.
[53] Ibid., Sec. 518.

Provision is also made for the establishment by the Commissioner of employment districts throughout the State and the maintenance of employment offices in each of such districts to aid persons seeking employment.[54] Indeed, a person who becomes unemployed, and who is entitled to receive benefits, is required to report periodically to the employment office in his district and, under certain conditions, must accept employment offered him or lose his rights to benefits.[55]

In futherance of the regulatory plan of the statute to reduce unemployment, provision is made for the eventual incorporation therein of a "merit rating" system, whereby the amount of contributions to be paid by an employer, or a group of employers, in a given field of employment, would be in direct ratio to the amount of unemployment in such business or industry. The law creates an advisory council, having full investigatory powers and full access to all sources of information, which is charged with the duty to

> "investigate and study the operation of this article upon the basis of the actual contribution and benefit experience hereunder with a view to classifying or grouping employers, employments, occupations or industries with respect to the frequency and severity of unemployment of each, taking due account of any relevant and measurable factors relating thereto, and to report on the practicability of the establishment of a rating system which would most equitably operate to rate the unemployment risk and fix the contributions to such fund for each employer, group of employers, employment, occupation or industry and to encourage the stabilization of employment therein."[56]

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[54] Ibid., Sec. 518.
[55] Ibid., Secs. 503, 506.
[56] Ibid., Sec. 518, subdiv. 4.

Covered Employment Under the New York Statute.

Unlike the Federal Unemployment Tax Act[57] (formerly Title IX of the Social Security Act), and those of most of the other States, the New York statute has never contained a provision specifically excluding from its coverage employment as an officer or member of a crew of a vessel operating on the navigable waters of the United States.[58]

Although the New York statute, since its original enactment (L. 1935, Ch. 468), has always defined covered employment in sufficiently broad terms to include maritime employment, it was administratively construed shortly after its enactment not to apply to such employment.

In 1936, the Attorney General of the State of New York rendered an official opinion which held that the statute could not constitutionally be applied to officers and members of the crew of a vessel. The official headnote of the opinion reads as follows:

> "The Unemployment Insurance Fund Act does not apply to owners of vessels documented under the laws of the United States, or to owners of tug, ferry boats, etc., operating exclusively in navigable waters within the geographical limits of the State."

And the opinion went on to state that:

> "The New York State law, however, is silent as to admiralty employment and there being no specific exemption, the State law provisions seem to be all embracing. There being no exemption, at first blush it would appear that officers and members of crew should be included in our State law. The decision

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[57] 26 U. S. C. A. 1600-1611.

[58] N. Y. Labor Law, Sec. 502 (1), McKinneys, Vol. 30, Historical Note, Supplement, page 45.

> of the United States in the *Knickerbocker* [Knickerbocker Ice Co. *v.* Stewart, 253 U. S. 149] and *Washington* [State of Washington *v.* Dawson, 264 U. S. 219] cases seem to hold that such inclusion, however, is unconstitutional and in contravention of federal statute."[59]

Significantly, since the issuance and publication of the Attorney General's opinion in 1936, the New York State Legislature has amended the definition of "employment" in the Unemployment Insurance Law, on at least four occasions, but it never attempted to overrule the opinion of the Attorney General by expressly including maritime employment within the coverage of the law.[60]

POINT I.

THE CLAIMANT WORKED AS A MEMBER OF THE CREW OF A DOCUMENTED VESSEL OPERATED ON THE NAVIGABLE WATERS OF THE UNITED STATES.

The Court of Appeals conceded that the claimant Cassaretakis was engaged in maritime employment, but affirmed the determination of the Appeal Board that the claimant was not a member of the crew of a vessel. In its opinion the Court stated:[61]

> "As to the four claimants who were found to be members of the crews of vessels, *Sheredos was a cook on a self-propelled vessel* carrying petroleum between points in New York and New Jersey; Schein was an attendant on a speed boat which transported passengers to the Worlds Fair; Knowlson was a second

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[59] 1936 Op. Atty. Gen. 258.
[60] Note 58, *supra.*
[61] R. 108, 109.

> engineer on a tugboat; Smith was a fireman on a lighter. *All were plainly members of crews of vessels.* On the other hand, *Cassaretakis was assistant cook on board a dredge* which was employed in a land filling operation in connection with the construction of a public highway. * * * *The employment of* [Cassaretakis], *therefore may be deemed incidental to construction* * * * *operations* * * * *rather than to navigation.*"

Since the Court of Appeals, the Appeal Board and the Referee were in complete unanimity of opinion that Sheredos, a cook aboard a self-propelled oil tanker, was a member of a crew of a vessel,[62] it is at once apparent that it was not because of the nature of his duties that the claimant Cassaretakis was held not to be "a member of the crew". As appears from the decision of the Appeal Board, which was affirmed by the Court of Appeals, Cassaretakis was held not to be "a member of the crew" because the dredge on which he was employed was held not to be a "vessel." In its decision in the instant case, the Appeal Board said:[63]

> "Appeal Board No. 2552-40 [the Sheredos case] relied on by the appellant, is not in point. The latter case involved a 'vessel propelled by steam commissioned to carry petroleum products.' *In the instant case, the vessel is a non-self propelled dredge carrying neither cargo nor passengers.*"

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[62] *Lake Tankers,* Appeal Board Case No. 2552-40, now on appeal to this Court. *Sub Nom. Lake Tankers Corp.* v. *Miller,* Docket No. 813, October Term 1942. Accord: Appeal Board Case No. 496-38. See also: *Allen* v. *Hallett,* Abb. Adm. 573, Fed. Cas. 223; *Maryland Casualty Co.* v. *Lawson* (C. C. A. 5th, 1938), 94 F. (2d) 190; *The Marie,* 49 Fed. 286; *The Yacht Revenge,* 1940 A. M. C. 510; *The Buena Ventura,* 243 Fed. 797; *cf. Warner* v. *Goltra,* 293 U. S. 155; U. S. Treasury Reg. 107, Sec. 403.211.

[63] R. 3; see also Referee's decision at R. 8.

It is submitted that such a determination involves a basic proposition of law and one of constitutional jurisdiction. Parenthetically, it may be added that this same question is basic, not only under the New York law, but also under the unemployment insurance laws of many of the other States which (like the Social Security Act) have specifically exempted "members of the crew of a vessel operating on the navigable waters of the United States."

(A) The Dredge Miami on which Claimant was Employed is a Vessel.

The dredge *Miami* was licensed and enrolled as a vessel of the United States.[63]

It should be unnecessary to argue that a large modern hydraulic dredge such as the *Miami* is a "vessel" within the meaning of Federal and State statutes.

As previously pointed out herein, the *Miami* is a seaworthy vessel, designed to operate on navigable waters and capable of long ocean voyages which she has made from time to time.[64] Its function is to pick up sand, mud and other materials at one time and transport such materials to another point.[65] The *Miami* carries her own sea stores, fuel, supplies and materials. When engaged in dredging operations, she carries a crew of 42 to 50 men, and when at sea she usually transports a crew of from 25 to 30 men.[66]

Even if the Miami were not self-propelled, she would still be a "vessel" under the authorities. The fact that she delivers her cargo by pipe line, instead of by a sling, is immaterial. As early as 1884 it was held that dredges are vessels engaged in and having direct relation to com-

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[63] Exhibits A and B, R. 89, 90A.
[64] Page 6, *supra.*
[65] Page 7, *supra.*
[66] Page 5-7, *supra.*

merce and navigation.[67] Since then, the Federal courts have consistently held that dredges are "vessels" engaged in navigation, maritime transportation and commerce.[68]

(B) The Dredge on which Claimant was Employed was Being Operated on Navigable Waters.

The *Miami* was at all times here in question afloat and operating on navigable waters adjacent to Brooklyn, N. Y. and while engaged in dredging was approximately 2,000 feet off the nearest shore point.[69] Her operations were clearly maritime.

Apparently the Appeal Board considered that, since the *Miami* pumped her dredged materials landward to create new shorefront, she was no longer engaged in maritime work. Such assumption is contrary to settled law. In *Bowers Hydraulic Dredging Co.* v. *Federal Contracting Co.*, it was held that "such artificial distinctions as arise out of the work of the dredging being performed partly on land and for the purpose of a land transaction, should not

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[67] *The Dredge Alabama* (D. C. Ala., 1884), 19 Fed. 544, aff'd 22 Fed. 449.

[68] *Charles Barnes Co.* v. *One Dredge Boat* (D. C. E. D. Ky., 1909), 169 Fed. 895; *Saylor* v. *Taylor* (C. C. A. 4th, 1896), 77 Fed. 476; *Ellis* v. *United States* (1907), 206 U. S. 246; *Warren & Arthur Smadbeck Dredging Co.* (C. C. A. 2nd, 1931), 50 F. (2d) 99 (dredge chartered to build new land with dredged material); *Kibadeaux* v. *Standard Dredging Co.* (C. C. A. 5th, 1936), 81 F. (2d) 670; cert. den. 299 U. S. 549 (modern hydraulic dredge pumping dredged material through pipe lines over pontoons to shore); *Maryland Casualty Co.* v. *Lawson* (C. C. A. 5th, 1938), 94 F. (2d) 190, 192; *Woods Bros. Construction Co.* v. *Iowa Unempl. Comp. Div.* (Feb. 11, 1941), 229 Iowa 1171, 296 N. W. 345 (barge).

For an exhaustive discussion of the subject see "Constitutionality of State Unemployment Legislation as Applied to Dredge Boat Crews" (by E. P. Deutsch), Tulane Law Review (Feb., 1941), Vol. XV, pp. 241-62.

[69] R. 31, 51, 61 and Exhibits D, E, E-1.

oust the court of jurisdiction of a floating structure which in its ordinary purpose is distinctly maritime."[70]

Furthermore, to make the maritime nature of the work complete in the instant case, two additional facts are present. The dredged material was picked up in navigable waters[71] and was deposited at a place which had theretofore been navigable waters.[72] Under the *Bowers* case, *supra*, the work would have been maritime, even if the fill had been deposited on dry land.

The case of *South Chicago Coal & Dock Co.* v. *Bassett*,[73] referred to by the Court of Appeals in its opinion below,[74] has no application to the instant case. This Court was not there concerned with the determination of what constitutes a "vessel", but rather with the question of whether the nature of the injured employee's services to the vessel constituted him a "member of a crew of a vessel" within the meaning of that term as used in the Longshoremen's and Harbor Workers' Compensation Act.[75] In the instant case, the question is not whether the nature of the claimant's duties constitute him "a member of the crew", but rather whether the dredge on which claimant was employed is a "vessel".

Furthermore, the nature of the employment in the *Bassett* case bore no resemblance to that of claimant here. In that case, this Court, in affirming the decision of the Circuit Court, stated (p. 260):

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[70] 148 Fed. 290, 294 (1906); aff'd (C. C. A. 2nd, 1907), 153 Fed. 870; cert. denied 207 U. S. 587. Accord: *Warren & Arthur Smadbeck, Inc.* v. *Heling Contracting Corp.*, 50 F. (2d) 99.

[71] Exhibit D, R. 30, 92A; Exhibit E-1, R. 66, 94.

[72] R. 30 and Exhibit D.

[73] 309 U. S. 251.

[74] R. 108.

[75] 33 U. S. C. A., Sec. 901.

> "What the court considered as supporting the finding of the deputy commissioner was that the primary duty of the decedent was to facilitate the flow of coal to the vessel being fueled, that he had no duties while the boat was in motion, that he slept at home and boarded off ship and was called each day as he was wanted and was paid an hourly wage. Workers of that sort on harbor craft may appropriately be regarded as 'in the position of longshoremen or other casual workers on the water.' *Scheffer* v. *Morgan Towing Co.*, 68 F. 2d, 11, 12. Even if it could be said that the evidence permitted conflicting inferences, we think that there was enough to sustain the deputy commissioner's ruling."

As distinguished from the *Bassett* case, *supra*, the claimant here was concededly engaged aboard the dredge in preparing and serving meals to the others members of the crew while the dredge was in motion and carrying on its operations. Also he was regularly employed on the basis of a six-day week and he slept on board the dredge.

Clearly, the instant case deals with a "member of the crew of a vessel operating on the navigable waters of the United States."

POINT II.

THE NEW YORK UNEMPLOYMENT INSURANCE LAW AS APPLIED TO MARITIME EMPLOYMENT IS UNCONSTITUTIONAL AND VOID.

The New York statute when applied to employment as an officer or member of the crew of a documented vessel operating on the navigable waters of the United States, violates Article III, Section 2 of the Constitution of the

United States which confers exclusive jurisdiction over matters maritime upon the Federal Government.

In upholding the constitutionality of the New York Unemployment Insurance Law as applied to maritime employment, the New York Court of Appeals held that the statute merely levied a non-discriminatory excise tax based upon the exercise of the right or privilege of employing individuals and measured by wages paid to them. The Court held that the right to levy such a tax is inherent in state sovereignty and that it in no way affects the rights, duties or obligations of the parties to a maritime contract and in no way interferes with or contravenes the rule of uniformity required in maritime matters.

As previously shown herein, the New York statute is much more than a mere tax statute. In its broader aspects, it is essentially a regulatory statute, aimed at the prevention of unemployment.[76]

It is contended, however, that the statute as applied to maritime employment is unconstitutional, (a) whether considered purely as an excise tax or (b) whether it is viewed as an exercise of the police power of the state.

(A) New York State may not exact a tax for the privilege of exercising a federal franchise.

The dredge, upon which claimant here was employed, was duly enrolled and licensed by the Federal Government to engage in the coasting trade.[77] The privilege thus conferred must necessarily have included the right or privilege of having in one's employ persons capable of manning the dredge for, otherwise, the grant of the license by the Federal Government would have been meaningless.

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[76] *Supra*, at pp. 11-13

[77] Exhibits A and B, R. 26, 89, 90A.

In *Gibbons* v. *Ogden*, this Court, referring to the privileges conferred by enrollment and license under the Federal statutes, said [78]

> "These privileges cannot be separated from the trade, and cannot be enjoyed, unless the trade may be prosecuted. The grant of the privilege is an idle, empty form, conveying nothing, unless it convey the right to which the privilege is attached, and in the exercise of which its whole value consists."

When the State of New York attempts, as it is doing here, to exact from the appellant a tax for the privilege of having individuals in its employ, the State is in fact subjecting to tax the use and employment of the Federal license granted to appellant to operate its dredge on the navigable waters of the United States. That the State may not impose this additional burden on a federally granted franchise is clearly evident from the prior decisions of this Court. For example, in *Hall* v. *DeCuir*, this Court stated:[79]

> "Throughout our history, the acts of Congress have regulated the enrolment and license of vessels to be engaged in the coasting trade, and this court expressly determined that a State law which imposed another and an additional condition to the privilege of carrying on that trade within her waters is inoperative and void. *Sinnot* v. *Davenport*, 22 Howard 227; *Foster* v. *Davenport*, 22 *id.* 244; *Wheeling Bridge Company* v. *Pennsylvania*, 18 *id.* 432."

This doctrine was again enunciated in the case of *Moran* v. *City of New Orleans*, involving the right of the City of New Orleans to exact a license fee from towboat owners for

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[78] 9 Wheaton 1, 18.

[79] 95 U. S. 485, 506.

the privilege of operating the same between the Gulf of Mexico and New Orleans. In denying the municipality the right to exact such a tax, this Court said:[80]

> "It [the license fee] is said, however, to be a tax on an occupation, and for that reason not a regulation of commerce. * * * The sole occupation sought to be subjected to the tax is that of using and enjoying the license of the United States to employ these particular vessels in the coasting trade; and the State thus seeks to burden with an exaction, fixed at its own pleasure, the very right to which the plaintiff in error is entitled under, and which derives from, the Constitution and laws of the United States."

That a State may not impose a tax on instrumentalities essential to the conduct of an activity, the carrying on of which is subject to regulation and control of the Federal Government, is well illustrated by a series of decisions by this Court relating to attempts by the States to tax essential instrumentalities of interstate commerce.

In *Helson* v. *Kentucky*, the State attempted to apply its gasoline tax to gasoline purchased out of the State for use in Kentucky in operating an interstate ferry. This Court held the tax as thus applied to be an exaction for the privilege of using an instrumentality of interstate commerce. The Court said:[81]

> "And is not the fuel consumed in propelling the boat an instrumentality of commerce no less than the boat itself? *A tax, which falls directly upon the use of one of the means by which commerce is carried on, directly burdens that commerce.* If a tax cannot be laid by a state upon the interstate transportation of the subjects of commerce * * * it is little more

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[80] 112 U. S. 69, 74-75.
[81] 279 U. S. 245, 252.

than repetition to say that *such a tax cannot be laid upon the use of a medium by which such transportation is effected.*"

If, as is clearly indicated in the *Helson* case, *supra*, a State cannot lay a tax "upon the use of a medium" by which interstate transportation is effected, then certainly the same principle must be applicable to maritime operations, a field exclusively within the Federal jurisdiction. The only other difference between the *Helson* case and the instant one is that in the former the "medium" upon which the tax was attempted to be imposed was gasoline, whereas here the tax is being imposed on the right to have in appellant's employ officers and a crew to man and operate its dredge on the navigable waters of the United States in the exercise of a federally granted license.

In *Southern Pacific Co.* v. *Gallagher*,[82] after a review and analysis of its earlier decisions, this Court held that, while a State tax might constitutionally be applied to events *preliminary* to interstate commerce, the States were prohibited, under the principle enunciated in the *Helson* case, *supra*, from exacting a tax as the price of the privilege of using an instrumentality of interstate commerce. Clearly, in the instant case, the tax is not imposed on an event "preliminary" to the operation of appellant's dredge on the navigable waters, but on the very act of operation and for that reason violates the *Helson* doctrine.

The cases cited by the Court below are clearly not in point.[83] *Cooley* v. *Board of Wardens*, permitting State regulation of pilots, was premised on historical grounds. The Court there said:[84]

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[82] 306 U. S. 167.

[83] Opinion, R. 111.

[84] 12 How. 299, 315.

> "• • • it may be observed, that similar laws have existed and been practiced on in the States since the adoption of the federal constitution; that, by the Act of the 7th of August, 1789, 1 Stats. at Large, 54, congress declared that all pilots in the bays, inlets, rivers, harbors and ports of the United States, shall continue to be regulated in conformity with the existing laws of the States, etc.; and that this contemporaneous construction of the constitution since acted on with such uniformity in a matter of much public interest and importance, is entitled to great weight, in determining whether such a law is repugnant to the constitution • • •."

The cases of *Western Union Telegraph Co.* v. *Attorney-General*[85] and *Old Dominion S. S. Co.* v. *Virginia*[86] merely involved the right of a State to impose taxes on property situated within the State.

(B) New York State May Not Regulate Maritime Employment.

Considered as a regulatory statute, the New York Unemployment Insurance Law, as applied to maritime employment, violates the "rule of uniformity" required in maritime matters by reason of the provisions of Article III, Section 2, and Article II, Section 8 of the Constitution of the United States. In *Butler* v. *Boston & Savannah S. S. Co.*, this Court said:[87]

> "As the Constitution extends the judicial power of the United States to 'all cases of admiralty and maritime jurisdiction', and as this jurisdiction is held to be exclusive, the power of legislation on the same subject must necessarily be in the national legislature, and not in the state legislatures."

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[85] 125 U. S. 530.
[86] 198 U. S. 299.
[87] 130 U. S. 527, 557.

Earlier, in the case of *The Lottawanna*, this Court had said:[88]

> "One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states."

Subsequently in the cases of *Southern Pacific Co.* v. *Jensen*,[89] *Knickerbocker Ice Co.* v. *Stewart*,[90] and *Washington* v. *Dawson*,[91] this Court again applied the doctrine requiring uniformity in maritime matters to the Workmen's Compensation laws of the States of New York and Washington and held them unconstitutional because violative of such rule.

In *Southern Pacific Co.* v. *Jensen, supra*, the New York State law was held to be invalid because (p. 217) "the necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish;" Thereafter, in 1917, Congress amended the Judicial Code expressly *to authorize* the States to extend their Workmen's Compensation laws to seamen,[92] and New York attempted by new legislation to do so. However, when the law came before this Court

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[88] 88 U. S. 558 (21 Wall.), 575.
[89] 244 U. S. 205 (1917).
[90] 253 U. S. 149 (1920).
[91] 264 U. S. 219 (1924).
[92] Act of October 6, 1917, Chap. 97, 40 Stat. 395.

in *Knickerbocker Ice Co.* v. *Stewart, supra,* it was again declared unconstitutional as applied to seamen, because, as stated by this Court (p. 166):

> "Here, we are concerned with a wholly different constitutional provision—one which, for the purpose of securing harmony and uniformity • • • prohibits material interference by the States. Obviously, if every State may freely declare the rights and liabilities incident to maritime employment, there will at once arise the confusion and uncertainty which framers of the Constitution both foresaw and undertook to prevent."

In 1922, Congress again attempted to amend the Judicial Code so as to permit the application of State Workmen's Compensation laws to seamen.[93] Thereafter the State of Washington attempted to include stevedores aboard vessels in its compensation statute, and once again this Court held that such statutes could not constitutionally be so applied. *Washington* v. *Dawson, supra.* Referring to the amendment to the Judicial Code, this Court in that case said:[94]

> "• • • the manifest purpose was to permit any State to alter the maritime law and thereby introduce conflicting requirements. To prevent this result the Constitution adopted the law of the sea as the measure of maritime rights and obligations. The confusion and difficulty, if vessels were compelled to comply with the local statutes at every port, are not difficult to see. Of course, some within the States may prefer local rules; but the Union was formed with the very definite design of freeing maritime commerce from intolerable restrictions incident to such control. *The subject is national.*"

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[93] Act of June 10, 1922, Chap. 216, 42 Stat. 634.
[94] 264 U. S. 219, 228.

It is submitted that the doctrine of uniformity applied by this Court in the Workmen's Compensation cases mentioned above, is equally applicable to the unemployment insurance law here in question. Both laws attempt to alter the incidents of maritime employment. Furthermore, the essential characteristics of both laws are identical, namely (a) the employer is taxed, (b) on a percentage of his payroll (c) with reference to risks of cessation of employment (due to injury in one case and lack of work in the other) (d) paid into a common fund, (e) administered by a State agency, (f) which pays out benefits to the employees, (g) for purposes of social welfare.[95]

Indeed, the similarity between the Workmen's Compensation cases and the New York Unemployment Insurance was emphasized by the Attorney General of the State of New York in his brief filed in this Court in *Chamberlin* v. *Andrews*.[96]

The New York Court of Appeals has attempted to distinguish the Unemployment Insurance statute from Workmen's Compensation laws on the ground that the former "does not in any way operate upon the contract of employment or interfere with maritime and admiralty jurisdiction."[97] With reference to the Workmen's Compensation laws the Court said:[98]

> "These statutes become a part of the contract and thereby directly affect the rights and duties between the parties. * * * 'An award under the Workmen's Compensation Law is not made on the theory that a tort has been committed; on the contrary, it is upon

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[95] *Chamberlin* v. *Andrews*, 271 N. Y. 1, aff'd 299 U. S. 515, rehearing denied 301 U. S. 714; see also 4 Fordham Law Review, 485, 492.

[96] *Supra*, note 95.

[97] R. 113.

[98] R. 112.

> the theory that the statute giving the Commission power to make an award is read into and becomes a part of the contract. (*Matter of Post* v. *Burger & Gohlke*, 216 N. Y. 544.) The contract of employment, by virtue of the statute, contains an implied provision that the employer, if the employee be injured, will pay to him a certain sum to compensate for injuries sustained, or if death results, a certain sum to dependents."

In this respect, there is no difference between the Workmen's Compensation law and the Unemployment Insurance law. In the one case, the contract of employment, by virtue of the statute, contains an implied provision that the employer will make contributions to a fund to provide for injury to the employee during the course of his employment, while in the other, the contract, by virtue of the unemployment insurance law, contains an implied provision that the employer will make the contribution to a fund to provide for the employee if he becomes unemployed. In each case, the contract of employment is modified by the insertion of an insurance provision, one to cover injury, the other to cover lack of employment. Both laws directly affect the rights and liabilities of the parties to a maritime contract of employment and for that reason are, it is submitted, equally invalid when so applied because "the rights and liabilities of the parties arose out of and depended upon general maritime law and "[can] *not be enlarged or impaired by the state statute.*"[99]

But even if a valid distinction did exist between the Workmen's Compensation and the Unemployment Insurance laws, it is submitted that the court below erred in assuming that it is only State legislation affecting the rights and liabilities under maritime contracts which violates the

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[99] *Robins Dry Dock Co.* v. *Dahl*, 266 U. S. 449, 457.

doctrine of uniformity. Regardless of whether a State statute affects a maritime contract, if it attempts to regulate or interfere with the conduct of maritime activities, it violates the rule of uniformity. The true purpose of the rule was aptly stated in *Hall* v. *DeCuir*, where it was said:[100]

> "Those who framed the Constitution never intended that navigation, whether foreign or among the States, should be exposed to such conflicting legislation; and it was to save those who follow that pursuit from such exposure and embarrassment that the power to regulate such commerce was vested exclusively in Congress."

And again in *Knickerbocker Ice Co.* v. *Stewart*, this Court said with reference to the exclusive authority granted to Congress to legislate with respect to maritime matters:[101]

> "The definite object of the grant was to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union."

The wisdom of prohibiting the several States from meddling with maritime employment by the application of their respective unemployment insurance laws is readily apparent. The confusion and impedance resulting from the application of state unemployment insurance to seamen can readily be imagined. It would mean that every ship, whether of American or foreign documentation, would

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[100] 95 U. S. 485, 498.
[101] 253 U. S. 149, 164.

have its crew subjected to coverage by the New York Unemployment Insurance law from the time it entered the ports of this State. Likewise, at each subsequent port of call, the unemployment insurance laws of other States would be applied. This would mean incredible confusion both to the maritime employer and to the maritime employee. Certainly, the application of state unemployment insurance laws is just as objectionable from this viewpoint as was the Workmen's Compensation law under consideration in *Washington* v. *Dawson, supra,* where in holding the statute invalid as applied to maritime employees, this Court pointed out the confusion and difficulty which would result if vessels were compelled to comply with local statutes at every port.

It is submitted that State control "cannot be extended to so general a system as unemployment compensation when applied to seamen without opening a wide breach in the constitutional uniformity required, and desirable in admiralty."[102]

The cases referred to by the Court of Appeals in its opinion do not support the attempt here being made to extend the New York Unemployment Insurance Law to maritime employment.[103] *People ex rel. Cornell Steamboat Co.* v. *Sohmer,*[104] merely sustained a State franchise tax as applied against a corporation of its own creation engaged in navigation. There the tax was imposed for a privilege conferred by the State. The case of *Transportation Co.* v. *Wheeling,*[105] sustained a personal property tax levied by the State on ships owned by residents and based on the value thereof. But the Court was careful to point out (pp. 280-1)

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[102] 15 Tulane Law Review, 241, 260.
[103] R. 113.
[104] 235 U. S. 549.
[105] 99 U. S. 273.

the inability of a State to tax a ship as an instrument of commerce. The case of *Sands* v. *Manistee River Improvement Co.*[106] simply approved State charges for the use of State constructed marine improvements. Once again, an exaction for a benefit conferred by the State.

POINT III.

CONGRESS HAVING PREEMPTED THE FIELD OF REGULATION OF MARITIME EMPLOYMENT, THE STATES ARE EXCLUDED THEREFROM.

It has been previously demonstrated that the authority of Congress to legislate with respect to maritime matters is exclusive and furthermore that such authority cannot even be *delegated* by Congress to the States.[107] But even if the field of regulation of maritime employment were one, where in the absence of action by Congress, the States might legislate, an examination of the Federal statutes will show that Congress has already occupied the field to the exclusion of the States.

U. S. Code, Title 46, Chap. 18, Sec. 713, defines a "seaman" as follows:

> "* * * every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same (any vessel belonging to any citizen of the United States) shall be deemed and taken to be a 'seaman'; and the term 'vessel' shall be understood to comprehend every description of vessel navigating on any sea or channel, lake or river, to which the provisions of this chapter may be applicable * * *."

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[106] 123 U. S. 288.

[107] Point II, pp. .....

And persons employed on dredges and scows have been held to be "seamen" within this section.[108]

An examination of the Federal statutes will demonstrate the extent to which Congress has legislated not only with respect to the welfare of seamen while employed, *but also while unemployed.*[108a]

Included among the various provisions for seamen contained in the Federal statutes are those relating to wages, clothing, food, hours of labor, and medical care.[109] There are also Federal statutes providing for hospitalization for seamen at the expense of the United States Government;[110] statutes providing for the care of sick and disabled seamen by the Federal Government;[111] a statute providing for the return to this country, at the expense of the Federal Government, of seamen, unemployed, destitute and stranded in foreign ports;[112] statutes setting the beneficiaries of a fund for the relief of sick and disabled seamen;[113] and authorizing the President of the United States to receive donations for such fund.[114]

In 1936, statutes were passed governing all maritime labor relations.[115] As a result of a petition to the President by the Maritime Labor Conference on December 19, 1941, the President created the Maritime [Labor] War Emergency Board to handle all matters between sea-going

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[108] *Saylor* v. *Taylor* (1896), 77 Fed. 476; *The Hurricane*, (1924), 2 F. (2d) 70, aff'd 9 F. (2d) 396.

[108a] See *Aguilar* v. *Standard Oil Co.* ..... U. S. ....., decided April 19, 1943.

[109] 46 U. S. C. A. Ch. 18.

[110] 24 U. S. C. A. 26.

[111] 42 U. S. C. A. 6.

[112] 46 U. S. C. A. 678.

[113] 24 U. S. C. A. 26-a.

[114] 24 U. S. C. A. 2.

[115] 46 U. S. C. A. 1251-1262.

personnel and operators of American merchant ships, to establish a uniform basis for payment of war risk insurance on the lives of crew members, and the establishment of war bonuses to be paid the crews.[116]

On January 1, 1940, the benefits of the old age pension provisions of the Federal Social Security Act were extended to cover officers and members of crews of vessels.[117] It has also been proposed from time to time that Congress establish Federal unemployment insurance coverage for seamen but, while this has been given serious consideration, such legislation has not as yet been enacted.[118]

In addition to the above mentioned statutes, the United States has entered into various treaties with other countries dealing with the welfare of seamen. For example, on June 13, 1938, the Senate gave its consent to the ratification of five treaties adopted by the International Labor Conference, covering various matters affecting the welfare of seamen, including (a) minimum requirement of professional capacity for masters and officers on board merchant vessels, (b) annual holidays with pay for seamen, (c) liability of ship owners in case of sickness, injury or death of seamen, (d) hours of work on board ship and manning, and (e) minimum age for admission of children to employment at sea.[119]

On August 19, 1937, the President of the United States submitted to the Senate certain additional treaties pertaining to the welfare of seamen, together with certain recommendations adopted by the Conference of Interna-

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[116] 1942 A. M. C. 309.

[117] 26 U. S. C. A. 1426 (b)(5).

[118] Hearings before Committee on Merchant Marine and Fisheries, 76th Cong. 3d Session (1940), p. 2; see also H. R. 5446 and H. R. 560 (77th Cong., 1st Sess.) and Hearing before Committee on Merchant Marine and Fisheries, 77th Cong., 1st Sess. (1941).

[119] 1938 A. M. C., Vol. 2, pp. 1285 *et seq.*

tional Labor Organizations. The President requested that the Senate give its advice and consent to the ratification of the treaties and also that the Senate, acting in conjunction with the House of Representatives, take appropriate action to give effect to the recommendations adopted by the Conference of International Labor Organizations.[120]

In addition to the foregoing statutes and treaties pertaining to the welfare of seamen, there are numerous draft Conventions, promulgated by the International Labor Conference and relating to the general welfare of seamen, which have already been adopted by many other nations and will, undoubtedly, in due course be considered and acted upon by the United States.[121]

Thus, it is apparent that Federal Statutes and treaties regulate practically every phase of a seaman's life. As this Court recently said in *Southern Steamship Company* v. *N. L. R. B.*:[122]

> "• • • workers at sea have been the beneficiaries of extraordinary legislative solicitude • • •. The statutes of the United States contain elaborate requirements with respect to such matters as their medicines, clothing, heat, hours and watches, wages, and return transportation to this country • • •."

In view of these many and varied statutes and treaties applicable to seamen, it must be obvious that Congress has completely occupied the field of regulation of maritime

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[120] Draft Convention concerning sickness insurance for seamen; Recommendation concerning the promotion of seamen's welfare in ports; and Recommendation concerning hours of work on board ship. 1938 A. M. C., Vol. 2, p. 1322; "Treaties Submitted to Senate 1935-39", Department of State Publication No. 1516, p. 20. These matters are still pending before the Senate. Department of State Publication No. 1620, p. 4.

[121] See Appendix C.

[122] 316 U. S. 31, 39 (1942). See also *Aguilar* v. *Standard Oil Co., supra, ante* [108a].

employment, *including that of social welfare.* In *Minnesota Rate Cases,* this Court said:[123]

> "It has repeatedly been declared by this court *that as to those subjects which require a general system or uniformity of regulation the power of Congress is exclusive. In other matters,* admitting of diversity of treatment according to the special requirements of local conditions, *the States may act* within their respective jurisdictions *until Congress sees fit to act; and, when Congress does act, the exercise of its authority overrides all conflicting state legislation.*"

In the instant case, the subject, namely, maritime employment, is not only one which requires uniformity of regulation, and for that reason is within the exclusive jurisdiction of Congress, but it is also one with respect to which Congress has already exercised its authority to the exclusion of the States.

POINT IV.

CONGRESS HAS INDICATED THAT IT INTENDED TO EXCLUDE MARITIME EMPLOYMENT FROM COVERAGE BY STATE UNEMPLOYMENT INSURANCE LAWS.

Congress has not only legislated with respect to the field of maritime employment, including the welfare of unemployed seamen in so far as was deemed feasible, but has also clearly indicated in the Federal Social Security Act that it intended to exclude such employment from coverage by the States.

The Federal Unemployment Tax Act specifically exempts from its coverage "service performed as a officer

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[123] 230 U. S. 352, 399-400 (1913).

or member of the crew of a vessel on the navigable waters of the United States."[124]

In *Buckstaff Co.* v. *McKinley*,[125] this Court held that whether an employment was covered by the Social Security Act was "extremely relevant" in determining whether such employment was to be covered by a state unemployment insurance law. In that case, the State of Arkansas was attempting to exact unemployment insurance contributions from an Arkansas corporation which had leased from the Secretary of Interior, and was operating, certain bath house facilities in Hot Springs National Park, a Government Reservation. In holding that the corporation was subject to the Unemployment Insurance law of the State of Arkansas, this Court said (pp. 362-64):

> "There can be no question but that the petitioner is liable for the tax levied by §901 of the Social Security Act, unless it is exempted by that portion of §907 which relieves 'an instrumentality of the United States' from that duty. But it seems clear that petitioner is not, within the meaning of the Social Security Act, such an instrumentality. • • •
>
> "That petitioner is subject to the Social Security Act is extremely relevant to the solution of the problem at hand. For that Act laid the foundation for a cooperative endeavor between the states and the nation to meet a grave emergency problem. • • • The Act was designed • • • to operate in a dual fashion—state laws were to be integrated with the federal Act; payments under state laws could be credited against liabilities under the other. That it was designed so as to bring the states into the cooperative venture is clear. The fact that it would operate though the states did not come in does not

[124] 26 U. S. C. A. 1607 (c)(4), formerly Sec. 907 (c)(3) of the Social Security Act, Appendix B.

[125] 308 U. S. 358.

alter the fact that there were great practical inducements for the states to become components of a unitary plan for unemployment relief. It is this invitation by the Congress to the states which is of importance to the issue in this case. For certainly, under the coordinated scheme which the Act visualizes, when Congress brought within its scope various classes of employers it in practical effect invited the states to tax the same classes. Hence, if there were any doubt as to the jurisdiction of the states to tax any of those classes it might well be removed by that invitation, for in absence of a declaration to the contrary, it would seem to be a fair presumption that the purpose of Congress was to have the state law as closely coterminous as possible with its own. To that extent that it was not, the hopes for a coordinated and integrated dual system would not materialize.

"Hence, it is our view that on the facts of this case, Congress has given Arkansas implied authority to tax petitioner under its Unemployment Compensation Law since the Congress has included under the Social Security Act employers such as petitioner. Clear evidence of a contrary intention would, of course, negative the existence of the implied authority. But here there is none. *That conclusion is strengthened by the exemption of certain classes of employers from the sweep of the federal Act.* Thus, the exclusion of federal instrumentalities from the scope of the federal Act, and hence from the complementary state systems, emphasizes the purpose to exclude from this statutory system only that well defined and well known class of employers who have long enjoyed immunity from state taxation."

Here we have the converse of the *Buckstaff Co.* case, *supra.* An examination of the Social Security Act shows that Congress, instead of inviting the States to bring maritime

employment within the coverage of their laws, has expressly excluded it from such coverage.

That both Congress and the States fully appreciated that the unemployment insurance laws of the several States could not be applied to those fields of employment that were within the jurisdiction of the Federal Government is evidenced by other provisions of the Social Security Act. As originally enacted, the Act provided in part as follows:[126]

> "No person required under a State law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate commerce or foreign commerce, or that the State law does not distinguish between employees engaged in interestate commerce or foreign commerce and those engaged in intrastate commerce."

We submit that it is highly significant that Congress thus specifically invited the States to cover the field of "interstate and foreign commerce", but did not extend any similar right to a State to cover the field of *maritime* employment. On the contrary, Congress exempted "members of crew" of vessels from the integrated scheme of unemployment insurance.

Since its original enactment, Congress has from time to time amended the Federal statute to permit the unemployment insurance laws of the States to cover (1) instrumentalities of the United States, other than those wholly owned or otherwise exempt, (2) National banks, and (3) persons employed on lands owned or held by the United States.[127] *But Congress has never attempted to amend the Social Security Act so as to permit the States to include*

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[126] 26 U. S. C. A. 1606, formerly Sec. 906 Social Security Act, Appendix B.

[127] 26 U. S. C. A. 1606, Appendix B.

maritime employment within the coverage of their laws. Since Congress has seen fit to remove the Federal immunity from the above enumerated types of employment, why, one may ask, has Congress not done likewise with respect to maritime employment? The answer to this question is at once apparent. In the case of those employments above enumerated, where the Federal immunity has been withdrawn, Congress had the constitutional right to remove such immunity, if it saw fit, and to permit the States to cover such employment. In the case of maritime employment, however, the situation is entirely different. Here, Congress was faced with a constitutional provision vesting it with exclusive jurisdiction over maritime matters which it could not delegate to the States even if it so desired.[128] This distinction was fully appreciated by the Social Security Board when, in its *Report to the President,* in 1939, it stated:[129]

> "Under the Constitution it is impossible to confer upon the States jurisdiction over maritime employment, with the possible exception of that incidental to employment on land. Therefore, in order to afford unemployment compensation protection to seamen it would be necessary to pass a Federal Act."

In its opinion the Court of Appeals said:[130]

> "The legislative history and the judicial interpretation of the Federal statute amply demonstrate

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[128] *Knickerbocker Ice Co.* v. *Stewart, supra; Washington* v. *Dawson, supra,* notes 90 and 91.

[129] Report of the Social Security Board Recommending Changes in the Social Security Act, Document No. 110, 76th Congress, 1st Session (1939) p. 16.

See also: Hearings on Social Security Act Amendments, 1939, before House Committee on Ways and Means (76th Congress, 1st Session); and the statement of Arthur J. Altmeyer, Chairman of Social Security Board on H. R. 6635, [Hearings before Senate Committee on Finance, 76th Cong., 1st Sess. (1939), p. 30].

[130] R. 115.

> that it was not intended thereby to strait-jacket the states in the enactment of their own unemployment insurance laws. (See Senate Report, No. 628, Cal. No. 661, 74th Congress, p. 14; *Stewart Machine Co.* v. *Davis, supra,* at pp. 539, 594.) The conclusion is inescapable that Congress intended to leave to the states the widest possible latitude in setting up their unemployment compensation systems both as to the kind and extent of coverage provided. This broad policy may not be overridden by the exemptions contained in section 1607 (subd. c) (Par. 4)."

It is submitted that the legislative history of the Federal statute, rather than showing an intent to include maritime employment within the coverage of the State laws, indicates exactly the contrary.

No clearer pronouncement with respect to Congressional intent to exclude State coverage of maritime employment could be found than in the remarks made during the course of the House debate on the original Social Security Bill. During the course of such debate the following colloquy between Representatives Vinson and McCormack occurred:[131]

> "Mr. Vinson of Kentucky: *They* [*seamen*] *were exempted in unemployment insurance because there is no power under State law to collect the tax from them. They come under maritime or admiralty jurisdiction, and the State sovereigns have not the power to collect the taxes.*
>
> "Mr. McCormack: Seamen are exempted under the unemployment-compensation title [Title IX] because of Constitutional reasons that do not apply to the contributory annuities [Title VIII].
>
> Mr. Vinson of Kentucky: That is what I just said. They were exempted under Title VIII because of administrative difficulties."

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[131] Cong. Record, Vol. 79, Part 6, p. 5903; see also Note 129, *supra.*

In the Senate Report referred to in the opinion quoted above, the Committee on Finance said:[182]

> "There are good arguments to be made in favor of each of these types of unemployment compensation laws. In accordance with the entire spirit of the Social Security Act, we believe that the Federal Government should not attempt to dictate to the States which type of unemployment compensation law they should adopt. The amendment we suggest to the House Bill will eliminate all such dictation and leave the States free to decide for themselves *which type best suits their local conditions.*"

To fully appreciate the significance of this statement it must be read in the light of the provisions of the Social Security Act, which exempted officers and members of crews of vessels.[183] Since, as the above statement clearly indicates, the State laws were to operate "locally" and since the Social Security Act already exempted officers and members of crew of vessels, naturally, Congress had no objection to each State enacting an unemployment insurance law to suit its own particular conditions.

Significantly, while Senate Report No. 628 shows that the Senate proposed to amend H. R. 7260 (the Social Security Bill) by including maritime employment under title VIII (Old Age Benefits), no similar amendment was suggested with respect to Title IX (Unemployment Insurance) of the Bill which specifically excluded such unemployment.

We believe the conclusion is inescapable that Congress intended to reserve to itself the field of unemployment insurance for maritime labor. Such intention is evidenced,

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[182] Senate Report No. 628, Cal. No. 661 (74th Cong.), p. 14.

[183] 26 U. S. C. A. 1607 (c)(4), formerly Sec. 907 (c)(3) of Social Security Act, Appendix B.

not only by the recent legislative history of the Social Security Act, but also by the long history of Congressional enactments relating to employment and unemployment of maritime labor, beginning with the early days of the Republic.

POINT V.

THE CONSTITUTIONAL RULE REQUIRING NATIONAL UNIFORMITY WITH RESPECT TO THE LAWS APPLICABLE TO MARITIME EMPLOYMENT HAS A PECULIAR APPLICATION TO THE CASE OF SEAMEN.

It has been previously pointed out that Congress has legislated with respect to practically every phase of a seaman's rights. A seaman, in the course of his employment, travels the seas of the world, touching many American ports and many foreign ports. As a rule, he does not reside in any particular locality. His ship is his home. He may sign up in a port in a State which he may never, or rarely, visit again. The employment of a seaman and the incidents of that employment are not matters of the local concern of any State. The status of seamen is a national concern and the problem of caring for seamen from the social aspect is one that the States cannot adequately deal with.

A seaman may be employed for years by different ships and different employers, and the ships on which he sails may touch many American ports. If the employer of the seaman has to pay into the various State Unemployment Insurance Funds a percentage of the seaman's wages, such a seaman would acquire a right, in case he becomes unemployed, to be paid unemployment insurance by perhaps as many as ten or fifteen States. As a practical matter,

how is the seaman to find out, after a period of years, to which State he should apply, and why should the seaman be forced to secure his insurance, in case he becomes unemployed, in small bites from several different State Funds?

The period during which he must be unemployed in order to secure rights under a particular State Fund, or the amount that he is entitled to receive under the various State Funds, will vary to a considerable degree. In order to receive his just due, the seaman would probably have to engage a lawyer and an accountant, and this might not do him much good, because he would not have kept a record of his various employers or the ports at which their ships touched.

Obviously, the laws providing Unemployment Insurance for seamen should be uniform. It is a matter with which the Congress should deal. Any unemployment system for seamen must be harmonized with the doctrine of maintenance and cure.

There has been, of course, a good deal of criticism of the Admiralty rule of uniformity. Clearly, however, if there is any sense at all in the rule of uniformity, the rule should be applied in the case of a seaman. It is submitted that, in the interests of the seamen themselves, this Court should not approve a system of possibly forty-eight different laws providing Unemployment Insurance for seamen, depending for their application on some temporary voyage or employment from time to time.

In the light of the concern that Congress and the Courts have shown with respect to seamen, it is difficult to attribute to Congress an intention to permit the legislatures of the forty-eight States to pass conflicting laws affecting the vital rights of seamen.

Conclusion.

The appellant respectfully submits:

1. That the claimant herein was a member of the crew of a vessel operating on the navigable waters of the United States as a matter of law;

2. That, in so far as the New York Unemployment Insurance Law seeks to include within the term "employment", services performed by claimant herein and other employees of the appellant, in connection with the operation of its dredges on the navigable waters of the United States, said law is unconstitutional, null and void;

3. That, with respect to the regulation of maritime employment, Congress has already occupied the field to the exclusion of the States;

4. That Congress has expressly and by necessary implication denied to the States the right to include maritime employment for seamen within the coverage of their respective unemployment insurance laws;

5. That even if Congress had expressly authorized the States to include maritime employment for seamen within the coverage of their respective unemployment insurance laws, the States could not have constitutionally done so;

6. The status of seamen is a national concern and the problem of caring for them from the social aspect is one that the States cannot adequately deal with.

Accordingly, the decision and order of the Court of Appeals of the States of New York and the order of the Appellate Division of the New York Supreme Court, Third

Judicial Department made and entered the 22nd day of October, 1942, on the remittitur of said Court of Appeals, should be reversed.

Respectfully submitted,

CLETUS KEATING,
H. MAURICE FRIDLUND,
CHARLES S. CUNNINGHAM,
Counsel for Appellant.

Dated, April 27, 1943.

APPENDIX A.

Relevant Provisions.

New York Unemployment Insurance Law.

(New York Consolidated Laws, Chapter 31, Labor Law, Art. 18.)

§ 502. Definitions.

* * * * * *

1. "Employment", except where the context shows otherwise, means any employment under any contract of hire, express or implied, written or oral, including all contracts entered into by helpers and assistants of employees, whether paid by employer or employee, if employed with the knowledge actual or constructive of the employer [in which all or the greater portion of the work is to be performed within this state].

(1) The term "employment" shall include an individual's entire service, performed within or both within and without this state if: (a) the service is localized in this state; or (b) the service is not localized in any state but some of the service is performed in this state, and (i) the base of operations, or, if there is no base of operations, then the place from which such service is directed or controlled, is in this state; or (ii) the base of operations or place from which such service is directed or controlled is not any state in which some part of the service is performed, but the individual's residence is in this state.

(2) Services performed within this state but not covered under paragraph (1) of this subdivision shall be deemed to be employment subject to this article if contributions are not required and paid with respect to such services under an unemployment compensation law of any other state or the federal government.

Note: Words in brackets above eliminated on March 27, 1941, N. Y. Laws, 1941, c. 169.

(3) Services not covered under paragraph (1) of this subdivision and performed entirely without this state, with respect to no part of which contributions are required and paid under an unemployment compensation law of any other state or of the federal government, shall be deemed to be employment subject to this article if the individual performing such services is a resident of this state and the commissioner approves the election of the employer for whom such services are performed that the entire service of such individual shall be deemed to be employment subject to this article.

(4) Service shall be deemed to be localized within the state if

(a) the service is performed entirely within the state; or (b) the service performed both within and without the state, but the service performed without the state is incidental to the individual's service within the state, for example, is temporary or transitory in nature or consists of isolated transactions.

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§ 502-a. Federal instrumentalities.

1. Pursuant to the authority conferred by subsection (b) of section sixteen hundred and six of the federal unemployment tax act and in conformity therewith, any instrumentality of the United States (except such as are (A) wholly owned by the United States or (B) exempt from the tax imposed by section sixteen hundred of said act by virtue of any other provision of law), shall, beginning with January first, nineteen hundred forty, be subject, except as provided in section fifty-two hundred and forty of the revised statutes of the United States, as amended and as modified by subsection (c) of section sixteen hundred and six of said act, to all the provisions of this article.

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§ 503. Liability for payment of benefits.

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3. No employee shall be entitled to any benefits unless he

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(b) has, as provided in this article, registered as totally unemployed and reported for work or otherwise given notice of the continuance of his unemployment; and

(c) has been paid qualifying wages as provided in section five hundred five of this article in the base year which, in accordance with section five hundred and two, subdivision eight of this article, applies to the benefit year for which the claim for benefits is made.

• • • • • •

§ 515. Payment of contributions.

1. On and after the first day of January, nineteen hundred thirty-six, contributions shall be payable by each employer then subject to this article. Contributions shall become payable by any other employer on and after the date on which he becomes subject to this article.

• • • • • •

§ 516. Contributions to the unemployment insurance fund.

The contribution regularly payable by each employer shall be an amount equal to two and seven-tenths per centum of the payroll of employees, as herein defined,

• • • • • •

§ 518. Administration.

1. This article shall be administered by the commissioner and for such purpose he shall have power to make all rules and regulations and, subject to the regulations of the civil service, to appoint such officers and employees as may be necessary in the administration of this article. The commissioner may afford reasonable cooperation with

every agency of the United States charged with the administration of any unemployment compensation law.

2. The commissioner may create as many employment districts and may establish and maintain as many state employment offices as he deems necessary to carry out the provisions of this article. The commissioner is authorized to cooperate with or to enter into agreements with the federal railroad retirement board or any other agency of the United States charged with the administration of an unemployment compensation law, with any political subdivision of this state, or with any private non-profit organization, with respect to the establishment, maintenance, and use of free employment service facilities and free public employment offices, and as a part of any such agreement the commissioner may accept moneys, services, or quarters as a contribution to the special "employment service account" in the unemployment administration fund.

3. It shall be one of the purposes of this article to promote the regularization of employment in enterprises, localities, industries and the state. The commissioner shall take such steps as are within his means for the reduction and prevention of unemployment. To this end the commissioner may employ experts, and may carry on and publish the results of any investigations and research which he deems relevant, whether or not directly related to the other purposes and specific provisions of this article.

4. There is hereby created a state advisory council of nine members to be appointed by the governor. * * * The commissioner shall, in so far as practicable, consult the state advisory council on all matters of major policies and procedures involved in or connected with the administration of this article, and he shall inform the council of the action taken in connection with such matters. The state advisory council shall consider and shall advise the commissioner upon all matters connected with this article submitted to it by the commissioner and may recommend upon its own initiative such changes in the administration of

this article as it deems necessary. It shall have full investigatory powers, and shall have direct access to all sources of information. Beginning with July first, nineteen hundred thirty-nine, the state advisory council shall report quarter-annually to the governor and at least once in each year to the legislature.

The council shall investigate and study the operation of this article upon the basis of the actual contribution and benefit experience hereunder with a view to classifying or grouping employers, employments, occupations or industries with respect to the frequency and severity of unemployment of each, taking due account of any relevant and measurable factors relating thereto, and to report on the practicability of the establishment of a rating system which would most equitably operate to rate the unemployment risk and fix the contribution to such fund for each employer, group of employers, employment, occupation or industry and to encourage the stabilization of employment therein. In determining the establishment of such rating system it is hereby declared to be the public policy that no rate of contribution on payrolls required from any individual employer shall be less than one per centum. The council shall report its findings and recommendations to the governor and the legislature not later than March first, nineteen hundred forty.

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5. The commissioner may divide the state into such number of employment districts as he finds necessary and maintain a district office in each of said districts. The commissioner shall establish such number of local employment offices as he finds necessary, which offices, in addition to the other duties prescribed herein and by the commissioner, shall act as free public employment exchanges.

§ 529. Fund to be sole source of benefits under article; nonliability of state.

1. The unemployment insurance fund established by this article shall be the sole and exclusive source for the

payment of benefits payable hereunder and such benefits shall be deemed to be due and payable only to the extent that contributions, with increments thereon, actually collected and credited to the fund and not otherwise appropriated and/or allocated are available therefor. The state of New York undertakes the administration of such fund without any liability on the part of the state beyond the amount of moneys received through allotment from the federal social security board or other federal agency, except as provided in subdivision two of this section.

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§ 530. Hearings on disputed claims for benefits.

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2. When the initial determination of a claim for benefits, upon which a hearing has been requested pursuant to the provisions of this section, involves the question whether any person is or was an employer within the meaning of and subject to this article and is or was liable for the payment of the contributions imposed upon employers by this article, or the question whether an employer, as defined by this article, has fully complied with the obligations imposed upon employers by this article, written notice of the hearing shall be given to such person or employer, either personally or by mail, and thereupon he shall be deemed a party to this proceeding, entitled to be heard. Upon such notice having been given, the referee may then decide such question or questions and any other issue related thereto, and his decision shall not be deemed limited in its effect to the immediate employee making the claim for benefits, but shall be deemed a general determination of such questions with respect to all those employed by such person or employer for all the purposes of this article, and such decision shall be conclusive and binding upon him, subject, however, to the right of appeal hereinafter provided.

APPENDIX B.

Relevant Provisions,

Federal Unemployment Tax Act.

(Tit. 26 Internal Revenue Code)

§ 1606. Interstate commerce and federal instrumentalities.

(a) No person required under a State law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate or foreign commerce, or that the State law does not distinguish between employees engaged in interstate or foreign commerce and those engaged in intrastate commerce.

(b) The legislature of any State may require any instrumentality of the United States (except such as are (A) wholly owned by the United States, or (B) exempt from the tax imposed by section 1600 by virtue of any other provision of law), and the individuals in its employ, to make contributions to an unemployment fund under a State unemployment compensation law approved by the Board under section 1603 and (except as provided in section 5240 of the Revised Statutes, as amended,[1] and as modified by subsection (c) of this section) to comply otherwise with such law. The permission granted in this subsection shall apply (1) only to the extent that no discrimination is made against such instrumentality, so that if the rate of contribution is uniform upon all other persons subject to such law on account of having individuals in their employ, and upon all employees of such persons, respectively, the contributions required of such instrumentality or the individuals in its employ shall not be at a greater rate than is required of such other persons and such employees, and if the rates are determined separately for different persons or classes of persons having individuals in their employ or for different classes of employees, the determination shall

[1] See sections 481-485 of Title 12, Banks and Banking.

be based solely upon unemployment experience and other factors bearing a direct relation to unemployment risk, and (2) only if such State law makes provision for the refund of any contributions required under such law from an instrumentality of the United States or its employees for any year in the event said State is not certified by the Board under section 1603 with respect to such year.

(c) Nothing contained in section 5240 of the Revised Statutes, as amended,[1] shall prevent any State from requiring any national banking association to render returns and reports relative to the association's employees, their remuneration and services, to the same extent that other persons are required to render like returns and reports under a State law requiring contributions to an unemployment fund. The Comptroller of the Currency shall, upon receipt of a copy of any such return or report of a national banking association from, and upon request of, any duly authorized official, body, or commission of a State, cause an examination of the correctness of such return or report to be made at the time of the next succeeding examination of such association, and shall thereupon transmit to such official, body, or commission a complete statement of his findings respecting the accuracy of such returns or reports.

(d) No person shall be relieved from compliance with a State unemployment compensation law on the ground that services were performed on land or premises owned, held, or possessed by the United States, and any State shall have full jurisdiction and power to enforce the provisions of such law to the same extent and with the same effect as though such place were not owned, held, or possessed by the United States. 53 Stat. 187, as amended Aug. 10, 1939, c. 666, Title VI, § 613, 53 Stat. 1391.

§ 1607. Definitions.

When used in this subchapter—

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[1] See sections 481-485 of Title 12, Banks and Banking.

(c) Employment. The term "employment" means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, within the United States by an employee for the person employing him, irrespective of the citizenship or residence of either, except—

* * * * * *

(4) Service performed as an officer or member of the crew of a vessel on the navigable waters of the United States;

* * * * * *

APPENDIX C.

List of Draft Conventions Pertaining to Seamen Promulgated by International Labor Conference

Unemployment Indemnity in Consequence of Shipwreck (Series No. 8), Genoa, 1920; now ratified or embodied in legislation by over 29 nations, including Canada.

Employment or Hiring of Seamen (Series No. 9), Genoa, 1920; now ratified or embodied in legislation by over 28 nations, including Canada.

Minimum Age for Trimmers and Stokers (Series No. 15), Geneva, 1921; now ratified or embodied in legislation by over 31 nations, including Canada.

Medical Examination of Young Persons Working at Sea (Series No. 16), Geneva, 1921; now ratified or embodied in legislation by over 32 nations, including Canada.

Seamen's Articles of Agreement (Series No. 22), Geneva, 1926; now ratified or embodied in legislation by over 22 nations, including Canada and Mexico.

Repatriation of Seamen (Series No. 23), Geneva, 1926; now ratified or embodied in legislation by over 18 nations, including Canada and Mexico.

(1938 A. M. C., Vol. 2, p. 1321.)

Multilateral Convention relating to the Assistance to Seamen in the Treatment of Venereal Diseases.

(Benedict "On Admiralty", 6th Ed., Vol. 6, p. 282.)